

***United States Court of Appeals
for the Second Circuit***



APPENDIX

76-2133

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THOMAS PULVER,

Petitioner-Appellant,

-against-

JOHN CUNNINGHAM, Warden, New York
City Correctional Institution for Men,

Respondent-Appellee.
-----X

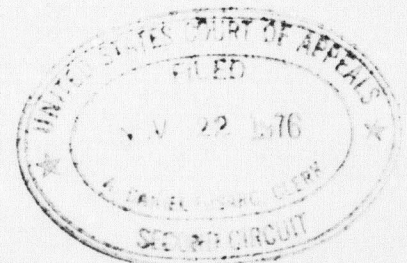
No. 76-2133

APPENDIX

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CIVIL DOCKET
UNITED STATES DISTRICT COURT

Jury demand date:

PRO SE
24 Civ. 2

D. C. Form No. 106 Rev.

TITLE OF CASE

ATTORNEY

THOMAS PULVER

-V-

WARDEN, NEW YORK CITY CORRECTIONAL
 INSTITUTION FOR MEN, JOHN CUNNINGHAM

For plaintiff:

Thomas Pulver,
 10-10 Hazen Street
 East Elmhurst, N.Y., 1137

For defendant:

Louis J. Lefkowitz
 Attorney General - State
 Two World Trade Center
 N.Y., N.Y. 10047

STATISTICAL RECORD

COSTS

DATE NAME OR RECEIPT NO.

REC.

J.S. 5 mailed X

Clerk

J.S. 6 mailed ✓

Marshal

Basis of Action:
 Writ of Habeas Corpus
 28 USC 2241

Docket fee

Witness fees

Action arose at:

Depositions

BEST COPY AVAILABLE

DATE

PROCEEDINGS

Jun 25, 74 Filed Petition for Writ of Habeas Corpus.
 Jun 25, 74 Filed order granting petition to proceed in forma pauperis.
 Oct 11, 74 Filed Affidavit and order extending respondent's time to answer
 petitioner's application for a writ of habeas corpus to 1/15/75.
 Nov 6, 74 Filed respondent's affidavit in opposition to petitioner's application
 for writ of habeas corpus.
 Dec 13, 74 Filed notice of assignment to Ward, J.
 Dec 24, 74 Filed Affidavit by Thomas Pulver in support of request to extend time to
 file answer to respondents. Affidavit in opposition to writ of habeas
 corpus, to 1/15/74.
 Dec 24, 74 Filed Memo. End. on affidavit of Thomas Pulver dtd. 12/24/74. Application granted.
 So Ordered Ward J. (mailed notice)
 Jan 20, 75 Filed Affidavit in answer to the opposition by Thomas Pulver.
 05-12-75 Filed letter from Pltff. addressed to Judge Ward, dated 5-5-75.
 06-09-75 Filed Petitioner's affidavit for leave to proceed in forma pauperis.
 06-10-75 Filed Memo End on Petitioner's affidavit filed 6-9-75. Let the applicant proceed
 without prepayment of costs or fees or the necessity of giving security therefor.
Ward, J.
 Jul 3, 75 Filed Memorandum Order. Gretchen White Oberman is hereby appointed by the
 Court to represent the petitioner. Pretrial conference shall be held
 within 30 days of this decision. Ward J. (mailed notice)
 7-20-76 Filed Petitioner's Memo of Law
 7-20-76 PRE-TRIAL CONFERENCE HELD BY W. J. D. J.
 8-27-76 Mailed notice of reassignment of this action to Haight, J.
 9-16-76 Filed Respondent's memorandum.
 9-16-76 Case reassigned to Judge Ward, J.
 9-16-76 Filed Petitioner's memorandum.
 9-16-76 Filed Respondent's memorandum.
 9-21-76 Filed Memo-End on Petition dtd 8-25-74. Petition dismissed with
 with Memorandum Decision filed herewith.WARD, J.
 by Pre-judicial.
 9-21-76 Filed Opinion & Order #45124. Petitioner filed an instant
 for a writ of habeas corpus while incarcerated pursuant to
 a judgment of conviction after a jury trial in N.Y. County.
 Supreme Court, N.Y. County. After a review of his or her
 petition, this Court appointed counsel to represent him.
 purposes of further proceedings limited to the question of
 whether tangible evidence & a statement by petitioner were
 admitted into evidence in violation of his Fourth Amendment
 rights. For the reasons indicated, the petition for a writ
 of habeas corpus must be dismissed. Since this case presents
 a significant question of law upon which the Court should
 rule, the Court will issue a Certificate of Probable
 Cause.So Ordered, WARD, J. n/m
 10-6-76 Filed Order that a Certificate of Probable Cause be issued permitting
 Petitioner to proceed with an appeal to the USCA from the
 denial of his Writ of Habeas Corpus.WARD, J. (Copy of
 Order sent to Petitioner by Docket Clerk). n/m
 10-6-76 Filed Order that Petitioner be granted leave to appeal to the USCA
 in forma pauperis.WARD, J. (Copy of Order sent by Docket
 Clerk). n/m
 Oct 15-76 Filed petitioner's notice of appeal from order of dismissal.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x

THOMAS PULVER,

Petitioner, :

OPINION

-against-

74 Civ. 2714

JOHN CUNNINGHAM, Warden,
New York City Correctional
Institution for Men, :

Respondent.

-----x

A P P E A R A N C E S

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DAVID L. BIRCH, ESQ.
Of Counsel

WARD, J.

Petitioner, Thomas Pulver ("Pulver"), was convicted after a jury trial in New York State Supreme Court, New York County, of criminal possession of stolen property in the second degree and was sentenced to a one year term of imprisonment. He filed the instant petition for a writ of habeas corpus while incarcerated pursuant to that judgment of conviction. After a review of his pro se petition, this Court appointed counsel to represent petitioner for purposes of further proceedings limited to the question of whether tangible evidence and a statement by petitioner were admitted into evidence in violation of petitioner's Fourth Amendment rights.

Memoranda were submitted in support of and in opposition to the granting of the writ by counsel for petitioner and by the Attorney General of the State of New York, respectively. Subsequently, the United States Supreme Court handed down its decision in Stone v. Powell and Wolff v. Rice, 44 U.S.L.W. 5313 (U.S. July 6, 1976). At the direction of the Court, counsel submitted supplemental memoranda concerning the effect of this decision upon the habeas corpus petition. For the reasons hereinafter stated, the petition for a writ of habeas corpus must be dismissed.

The facts underlying the petition are as follows:

On March 9, 1970, at about 5:00 P.M., Detectives Jacob and Schumacher of the Safe-Loft and Truck Squad observed petitioner and another man drive up to an apartment building at 302 Mott Street in a Volkswagen bus, remove three cartons from the vehicle and carry the cartons into the building. They could not see any writing on the boxes and they did not know their contents. Apparently, however, the detectives knew that petitioner and his companion occupied apartment 39 on the sixth floor of 302 Mott Street. Shortly after petitioner and his companion carried the cartons into the building, the two detectives entered to investigate. They went to apartment 39 and Detective Schumacher knocked on the door. Schumacher testified that:

[Petitioner] opened the door approximately three or four inches. I had my shield in my hand, and I was about to announce myself as a police officer when he shoved the door at me, and I shoved the door back at him trying to get in.

Detective Jacob testified that Schumacher "hit [the door] with force" and called to him for help. By the time Jacob got to the door, petitioner had succeeded in shutting it. Thereupon, Jacob went down the hall to a window and climbed out on the fire escape in the event the occupants of the apartment might try to exit via that route. Schumacher contin-

ued knocking at the door. Jacob testified that he, then, heard a window in the apartment opening and saw the three cartons jettisoned from the window. While he proceeded to retrieve the cartons, Schumacher continued to knock at the door. When Jacob returned, he and Schumacher were admitted to the apartment. Petitioner was read his Miranda rights and one of the detectives asked why he had thrown the boxes, which contained three adding machines, out the window. He replied, "They are the only things that have serial numbers."

The state trial court held separate hearings on petitioner's motion to suppress the tangible evidence and the statement. The state trial judge denied the motion to suppress the three cartons and their contents, holding that they had been abandoned and that there was no search or seizure. The court stated:

It is quite clear to the Court that at the time these cartons left the premises occupied by these defendants as their apartment, by the active and affirmative ejection of these cartons, they were discarded for the main and simple reasons, first, that the officers had seen them originally in the hands of the defendants when they brought it [sic] into the building; and secondly, by the fact that the officers were knocking on the door and were denied entrance.

The statement was likewise held to have been voluntarily made and the motion to suppress it was denied.

Petitioner contends that the tangible evidence and his statement should not have been received because they were obtained as a result of illegal police conduct. First, he

contends that the attempted forcible entry into his apartment was unlawful because it was unsupported by probable cause. Second, he contends that when Detective Jacob positioned himself on the fire escape and Detective Schumacher continued knocking at his door after they were unable to gain entry into the apartment, they blocked all means of egress and had effectively arrested him without probable cause. Petitioner's arguments find support in the state record as a whole. See Wong Sun v. United States, 371 U.S. 471 (1963); Fletcher v. Wainright, 399 F.2d 62 (5th Cir. 1968); Commonwealth of Massachusetts v. Painten, 368 F.2d 142 (5th Cir. 1966). However, the role of a federal court in reviewing claims of Fourth Amendment violations after Stone v. Powell and Wolff v. Rice, supra, is an extremely limited one. Even if this Court were to hold that petitioner's Fourth Amendment rights were violated by the police officers' conduct, the writ could not be granted unless petitioner was also denied a full and fair opportunity to litigate his Fourth Amendment claims in the state courts. Stone v. Powell, supra at 5321.

Petitioner contends that he was denied a full and fair opportunity to litigate his Fourth Amendment claims because some of the facts material to the determination were not revealed until trial. That is, at the suppression hearing there was no testimony concerning the detectives' forcible

attempt to keep petitioner from closing the apartment door. This was not revealed until trial, at which time trial counsel moved once again to suppress the evidence. However, this motion was denied by the trial judge.

Stone v. Powell, supra, does not provide any standards for determining what constitutes a "full and fair opportunity to litigate." Rather, the Supreme Court left this question open for future development on a case-by-case basis. Nevertheless, the court did provide some guidance by its citation to Townsend v. Sain, 372 U.S. 293 (1963). 44 U.S.L.W. at 5321 n. 36. In that case, the court had held that the federal court must conduct an evidentiary hearing on habeas corpus when the applicant for the writ was denied a full and fair evidentiary hearing in the state trial court. A full and fair hearing could be denied in six ways:

" . . . (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing."
372 U.S. at 313.

Applying these criteria, this Court would have no difficulty concluding that the state suppression hearing failed to adduce the material facts. However, even assuming that the

suppression hearing was not a full and fair fact hearing within the meaning of Townsend v. Sain, supra, does not mean that petitioner was denied a full and fair opportunity to litigate his Fourth Amendment claims. Stone v. Powell, supra, cannot be read merely as a reiteration of Townsend v. Sain, supra. It is apparent that the opportunity to litigate encompasses more than an evidentiary hearing in the trial court. That is, it includes that corrective action available through the appellate process on direct review of the judgment of conviction. Thus, according to the court in Stone v. Powell:

The question is whether state prisoners -- who have been afforded the opportunity for full and fair consideration of their reliance upon the exclusionary rule with respect to seized evidence by the state courts at trial and on direct review -- may invoke their claim again on federal habeas corpus review.

44 U.S.L.W. at 5320 (emphasis added).

The Court answers this question as follows:

In sum, we hold only that a federal court need not apply the exclusionary rule on habeas review of a Fourth Amendment claim absent a showing that the state prisoner was denied an opportunity for a full and fair litigation of that claim at trial and on direct review.

44 U.S.L.W. at 5321 n. 37 (emphasis added).

Accordingly, it would appear that an applicant for habeas corpus must demonstrate that the state appellate process

was in some equivalent way inadequate to correct errors of the trial court.

In the instant case, the record discloses no such inadequacy in the appellate process. Petitioner appealed his conviction to the Appellate Division, First Department, which affirmed unanimously. Leave to appeal to the Court of Appeals was denied. In his brief on appeal, petitioner quoted liberally from the new testimony adduced at trial. He then argued:

It would seem clear that the attempted warrantless and forcible entry into the apartment for the purpose of seizing the machines was the sole cause of defenestration of the three machines. . . . Accordingly, this evidence, discovered through the terrifying and illegal attempts of the police to break down defendant's door . . . should have been suppressed.

Inasmuch as all the material facts were before the state appellate courts on direct review and this Court can find no basis for concluding that the appellate process was otherwise deficient, petitioner has had a full and fair opportunity to litigate his Fourth Amendment claims. Accordingly, the petition for a writ of habeas corpus must be dismissed.

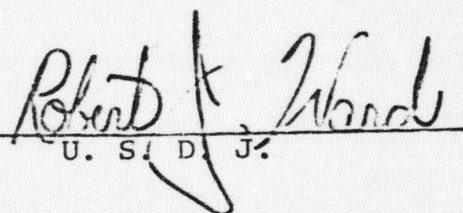
The Court wishes to express its appreciation to appointed counsel who represented petitioner diligently and competently.

Since the effect of Stone v. Powell, supra, upon

this action poses a significant question of law upon which the Court of Appeals should rule, the Court will issue a Certificate of Probable Cause.

It is so ordered.

Dated: September 21, 1976



U. S. D. J.